No. 14-1055

In the Supreme Court of the United States

CRYSTAL MONIQUE LIGHTFOOT, ET AL., PETITIONERS

v.

CENDANT MORTGAGE CORPORATION, DBA PHH MORTGAGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the charter of the Federal National Mortgage Association (Fannie Mae), which authorizes Fannie Mae to sue and be sued "in any court of competent jurisdiction, State or Federal," 12 U.S.C. 1723a(a), confers original jurisdiction on federal courts over all cases to which Fannie Mae is a party.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In 1934, in the midst of the Great Depression, Congress enacted the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246, to help resuscitate the nation's housing market and protect lenders from mortgage default. The law created the Federal Housing Administration (FHA), which is now a part of the Department of Housing and Urban Development (HUD). The following year, concerns over whether banks could bring suit against FHA led Congress to enact a provision authorizing FHA (and now HUD) "to sue

and be sued in any court of competent jurisdiction, State or Federal." Banking Act of 1935, Pub. L. No. 74-305, Tit. III, § 344(a), 49 Stat. 722 (12 U.S.C. 1702); see *Korman* v. *FHA*, 113 F.2d 743, 746 & n.15 (D.C. 1940).

The National Housing Act also contemplated that FHA would establish independent "national mortgage associations" that would enter the secondary-mortgage market. § 301(a), 48 Stat. 1252. The associations were designed to "promote access to mortgage credit throughout the Nation * * * by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. 1716(4). The National Housing Act authorized such associations "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." § 301(c)(3), 48 Stat. 1253.

The Federal National Mortgage Association (Fannie Mae) was chartered in 1938 as a national mortgage corporation owned entirely by the federal government. In 1954, Congress converted Fannie Mae into a mixed-ownership corporation, meaning that the federal government held its preferred stock and private investors held its common stock. Housing Act of 1954, Pub. L. No. 83-560, § 303, 68 Stat. 613-615; see Pet. App. 34a. Congress also amended Fannie Mae's charter to provide that Fannie Mae could sue and be sued "in any court *of competent jurisdiction*, State or Federal." § 309(a), 68 Stat. 620 (emphasis added). That change rendered the language in Fannie Mae's charter identical to the language that applied to FHA. Compare 12 U.S.C. 1723a(a) (Fannie Mae), with 12 U.S.C. 1702 (FHA).

In 1968, Congress split Fannie Mae into two separate corporations: Fannie Mae and the Government National Mortgage Association (Ginnie Mae). See Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Tit. VII, 82 Stat. 536. Fannie Mae, which was converted into a privately held corporation, purchases conventional mortgages; Ginnie Mae, which is wholly owned by the government and housed within HUD, guaranties the timely payment of principal and interest on mortgage-backed securities that are secured by pools of government home loans. Ginnie Mae's sue-and-be-sued clause is the same as Fannie Mae's. See 12 U.S.C. 1723a(a).

2. a. In July 2002, following foreclosure on their home, petitioners filed suit in state court against respondents Cendant Mortgage Corporation (which had financed the mortgage), Fannie Mae (which had purchased the loan but then sold it back to Cendant), Attorneys Equity National Corporation (which had become trustee for the property), and Robert Matthews (the current property owner). Fannie Mae removed the case to the United States District Court for the Central District of California on the basis of its sue-and-be-sued clause, Pet. App. 45a-49a, and petitioners unsuccessfully sought a remand to state court, *id.* at 43a-44a. Petitioners then filed an appeal, but the Ninth Circuit noted that "the order challenged in the appeal is not final or appealable." 02-56586 Order (Oct. 11, 2002).

In February 2003, the district court dismissed the suit as to Cendant, Fannie Mae, and Matthews—but not Attorneys Equity—on the basis of res judicata because petitioners had already filed two suits unsuccessfully challenging the foreclosure. D. Ct. Doc. 59

(Feb. 20, 2003).[1] Petitioners filed a notice of appeal, but the Ninth Circuit dismissed the appeal "because the order challenged in the appeal is not final or appealable." 03-55389 Order (Apr. 11, 2003).

In the district court, petitioners moved unsuccessfully to set aside the judgment as to Cendant, Fannie Mae, and Matthews; they also moved unsuccessfully for a default judgment against Attorneys Equity. D. Ct. Doc. 78, 79 (Aug. 29, 2003). Petitioners appealed from the denials of both motions, and this time the Ninth Circuit summarily affirmed the district court's judgment without receiving a response brief and without discussing whether the judgment being appealed was final. 03-56580 Mem. (Dec. 15, 2003). Petitioners filed a petition for a writ of certiorari, which this Court denied. 543 U.S. 918.

b. After an unsuccessful mandamus petition in the court of appeals, see 08-73461 Order (Nov. 3, 2008), petitioners returned to the district court, where they sought to restore the case to the court's active calendar. Petitioners moved for entry of a final judgment under Federal Rule of Civil Procedure 54, noting that the court had not previously issued a final judgment that included defendant Attorneys Equity. D. Ct. Doc. 92 (Apr. 7, 2009). An attorney who had formerly represented Attorneys Equity explained that the corporation had become defunct. D. Ct. Doc. 97, at 2 (May 18, 2009).

In October 2009, the district court entered judgment in favor of Cendant, Fannie Mae, and Matthews on the basis of its prior order granting their motions to dismiss; the court did not enter judgment with

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[1] All district court docket references are to Case No. 02-cv-6568 (C.D. Cal. filed Aug. 22, 2002).

respect to Attorneys Equity. D. Ct. Doc. 99 (Oct. 21, 2009). Petitioners then filed another mandamus petition in the Ninth Circuit, asking the court of appeals to direct the district court to enter judgment with respect to Attorneys Equity. The Ninth Circuit denied the petition "without prejudice to the filing of a new petition if the district court has not entered a final judgment with respect to defendant Attorneys Equity National Corporation within 60 days." 09-74079 Order (Apr. 14, 2010).

c. Once again, petitioners returned to the district court. In June 2010, the court issued an order dismissing the action with prejudice against Attorneys Equity on the basis of res judicata, D. Ct. Doc. 103 (June 11, 2010), and it entered judgment the same day, D. Ct. Doc. 104. Also that same day, petitioners moved under Rule 60(b) to set aside the judgments—which by now had been granted in favor of all defendants—based on allegations of "fraud upon the court." D. Ct. Doc. 105. The court denied the motion, finding it untimely as to Cendant, Fannie Mae, and Matthews, and without merit as to all defendants. D. Ct. Doc. 117 (Sept. 27, 2010).

On appeal, the Ninth Circuit summarily affirmed the district court's judgment dismissing petitioners' action and denying their Rule 60(b) motion. 465 Fed. Appx. 668. Petitioners moved for rehearing, and in April 2012 the court of appeals *sua sponte* withdrew its prior opinion (and denied the rehearing petition as moot). The court appointed counsel for petitioners and requested briefing on the question "whether the district court had subject matter jurisdiction on the basis of the federal charter of the Federal National

Mortgage Association." 10-56068 Order (Apr. 13, 2012).

3. After further briefing and oral argument, a divided panel of the Ninth Circuit affirmed the district court's judgment. Pet. App. 3a-40a.

The court of appeals held that the sue-and-be-sued clause in Fannie Mae's charter "confers federal question jurisdiction over claims brought by or against Fannie Mae." Pet. App. 5a. For that conclusion, the court relied primarily on this Court's decision in *American National Red Cross* v. *S.G.*, 505 U.S. 247 (1992) (*Red Cross*), which addressed a similar question with respect to the Red Cross's sue-and-be-sued clause. That clause authorizes suit by or against the Red Cross "in courts of law and equity, State or Federal, within the jurisdiction of the United States." 36 U.S.C. 2. Drawing on its own prior opinions stretching back to 1809, the Court concluded in *Red Cross* that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." 505 U.S. at 255. Applying *Red Cross* to petitioners' suit, the court of appeals held that Fannie Mae's sue-and-be-sued clause, which also mentions the federal courts, similarly provides an independent basis for federal jurisdiction.

Petitioners argued that a different result was warranted because Fannie Mae's sue-and-be-sued clause, unlike that of the Red Cross, refers to "any court *of competent jurisdiction*, State or Federal." The court of appeals rejected that contention. The court noted that the italicized phrase was added to the clause in 1954, and it found no indication that Congress intended to strip previously conferred jurisdiction over suits

by or against Fannie Mae. Pet. App. 8a-11a. The court rejected the argument that its "holding render[ed] superfluous the phrase 'court of competent jurisdiction.'" *Id.* at 12a. It reasoned that the phrase "can easily be read" to "emphasize that the clause did not authorize or require the exercise of subject matter jurisdiction by a state court with narrow, specialized jurisdiction." *Id.* at 12a-13a. Finally, having concluded that "the sue-and-be-sued clause in Fannie Mae's federal charter confers federal question jurisdiction over suits in which Fannie Mae is a party," the court of appeals affirmed the district court's dismissal of petitioners' claims "for the reasons stated in our previous unpublished disposition." *Id.* at 21a.

Judge Stein, sitting by designation, dissented. Pet. App. 21a-40a. Describing the rule articulated in *Red Cross* as a "default," *id.* at 25a, Judge Stein concluded that the "'of competent jurisdiction' proviso" in Fannie Mae's sue-and-be-sued clause "requires an alternative basis of jurisdiction," *id.* at 27a. Judge Stein also observed that "the non-jurisdictional reading of the 1954 sue-and-be-sued clause meshes comfortably with Congress' overall intention when enacting the Housing Act of 1954," which was "to put Fannie Mae on a path that would eventually take the federal government out of the secondary mortgage market." *Id.* at 35a-36a. Judge Stein explained that, "[a]s part of this process, Congress removed Fannie Mae's jurisdiction-granting sue-and-be-sued clause and elected the default option for federally chartered corporations—that they do not automatically gain access to the federal courts, unless the government owns more than half of the corporation's capital stock." *Id.* at 36a. Judge Stein pointed as well to a separate provi-

sion, added in 1974, specifying that Fannie Mae "shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." *Id.* at 38a (quoting 12 U.S.C. 1717(a)(2)(B)). Judge Stein reasoned that, if Congress had intended for Fannie Mae's charter to confer federal jurisdiction in all suits, there would have been no need to give Fannie Mae D.C. citizenship for purposes of diversity jurisdiction. *Ibid.*

DISCUSSION

Fannie Mae's charter provides that it may sue or be sued "in any court of competent jurisdiction, State or Federal." 12 U.S.C. 1723a(a). Contrary to the decision below, that provision does not confer on federal courts original jurisdiction over all cases to which Fannie Mae is a party. Because of the importance of the question, the substantial uncertainty that it has created in the lower courts, and the frequency with which it arises, this Court should grant the petition for a writ of certiorari.

A. Fannie Mae's Charter Does Not Provide District Courts With Original Jurisdiction Of Suits Brought By Or Against Fannie Mae

1. a. Congress has given the federal district courts original jurisdiction of suits brought by federal agencies, 28 U.S.C. 1345, and has authorized federal agencies to remove to federal court suits that are filed in state court, 28 U.S.C. 1442(a)(1). Congress has further provided that certain federally created entities, such as the Federal Home Loan Mortgage Corporation (Freddie Mac), shall be deemed to be federal agencies for jurisdictional and removal purposes. 12 U.S.C. 1452(f). Pursuant to such provisions, many federally

created entities may insist that suits brought by or against themselves will be adjudicated in federal court, even when those suits assert state rather than federal causes of action.

In the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), this Court held that Congress's grant of jurisdiction to district courts in suits "arising under" federal law encompassed all suits by or against federally chartered entities. *Id.* at 11. Such entities were therefore entitled to file a suit in, or to remove a state-court suit to, federal court on the theory that the suit arose under the laws of the United States. In 1925, however, Congress limited the scope of "arising under" jurisdiction by providing that district courts would not "have jurisdiction of any [civil] action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, * * * [unless] the United States is the owner of more than one-half of its capital stock." Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941 (codified at 28 U.S.C. 1349).

Congress has not authorized Fannie Mae to invoke Section 1345 to bring suit in federal court or Section 1442 to remove suits filed in state court. Fannie Mae's status as a federally chartered entity likewise does not provide an independent ground for federal jurisdiction because the government does not own more than one-half of Fannie Mae's capital stock. See 28 U.S.C. 1349. Federal jurisdiction in this suit therefore turns on whether Fannie Mae's charter provides an independent source of federal jurisdiction.

b. This Court has long recognized that Congress may use a federally chartered entity's sue-and-be-sued clause to create federal jurisdiction. In *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738

(1824), the Court held that a clause allowing the Bank of the United States to sue and be sued "in any Circuit Court of the United States" conferred federal jurisdiction. *Id.* at 817-818. In *Bankers Trust Co.* v. *Texas & Pacific Railway*, 241 U.S. 295 (1916), by contrast, the Court held that a federal charter permitting a railroad to sue and be sued "in all courts of law and equity within the United States" did not confer federal jurisdiction because it did not specifically mention the federal courts. *Id.* at 303-305 (citation omitted). And in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), the Court recognized jurisdiction based on an authorization to sue or be sued "in any court of law or equity, State or Federal." *Id.* at 455 (citation omitted).

In *American National Red Cross* v. *S.G.*, 505 U.S. 247 (1992) (*Red Cross*), the Court synthesized those decisions and others to arrive at the following principle: "[A] congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.* at 255. At issue there was a clause that authorized the Red Cross "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Id.* at 248 (quoting Act of Jan. 5, 1905, Pub. L. No. 58-4, 33 Stat. 600 (as amended at 36 U.S.C. 2)). Because the Red Cross's charter "authoriz[ed] the organization to sue and be sued in federal courts, using language resulting in a 'sue and be sued' provision in all relevant respects identical to" the provision found to confer federal jurisdiction in *D'Oench, Duhme*, the Court held that the charter "suffice[d] to confer federal jurisdiction." *Id.* at 257.

2. Fannie Mae's charter authorizes it to sue and be sued "in any court of competent jurisdiction, State or Federal." 12 U.S.C. 1723a(a). Although it mentions the federal courts, that provision differs in a critical respect from the language at issue in *Red Cross* by limiting its authorization to courts "of competent jurisdiction." That phrase suggests that the charter does not provide an independent basis for federal (or state) jurisdiction, but simply authorizes Fannie Mae to sue or be sued in any court for which some *other* jurisdictional basis exists. Cf. *Califano* v. *Sanders*, 430 U.S. 99, 106 n.6 (1977) (explaining that 5 U.S.C. 703, which authorizes judicial review "in a court specified by statute" or "in a court of competent jurisdiction," does not appear to function "as an independent jurisdictional foundation," since "[b]oth of those clauses seem to look to outside sources of jurisdictional authority"). To construe Fannie Mae's sue-and-be-sued clause more expansively would deprive the phrase "of competent jurisdiction" of its most natural meaning.

The court below reasoned that the phrase "of competent jurisdiction" would not become "superfluous" under its own interpretation because the phrase can be read as "emphasiz[ing] that the [sue-and-be-sued] clause did not authorize or require the exercise of subject matter jurisdiction by a state court with narrow, specialized jurisdiction." Pet. App. 12a-13a; see *id.* at 13a-14a ("The phrase makes clear that state courts of specialized jurisdiction—such as family courts and small-claims courts—need not entertain suits that do not satisfy those courts' jurisdictional requirements."). That argument would be persuasive only if a sue-and-be-sued clause *without* that phrase could plausibly be read to create jurisdiction in spe-

cialized state or federal courts. As explained above, however, the phrase "of competent jurisdiction" does not appear in the charters of the Red Cross or a number of other federally created entities. The Court in *Red Cross* did not suggest, and it is farfetched to suppose, that suits by or against such entities can be brought in specialized state or federal courts without regard to the jurisdictional prerequisites that would otherwise apply. See *Red Cross*, 505 U.S. at 267-268 (Scalia, J., dissenting). There is accordingly no reason to believe that inclusion of the phrase "of competent jurisdiction" in Fannie Mae's charter was thought necessary to avoid that result.[2]

The conclusion that Fannie Mae's charter does not itself create federal jurisdiction is reinforced by Congress's addition, in 1974, of a provision specifying that

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[2] For its contrary conclusion, the court of appeals relied on *Testa* v. *Katt*, 330 U.S. 386 (1947). See Pet. App. 13a-14a. The Court in *Testa* addressed whether Rhode Island's courts had permissibly declined to entertain a private suit under the federal Emergency Price Control Act, which gave state and federal courts concurrent jurisdiction over such suits, and which authorized certain private parties to sue "in any court of competent jurisdiction." 330 U.S. at 387 & n.1. Noting that "this same type of claim arising under Rhode Island law would be enforced by that State's courts," this Court held that Rhode Island's courts could not decline to hear the suit merely because of its federal nature. *Id.* at 394. Nothing in *Testa* suggests, however, that specialized state courts (such as the family and small-claims courts to which the Ninth Circuit in this case referred) would have been required to entertain suits under the Emergency Price Control Act if that law had not contained the phrase "of competent jurisdiction." Cf. *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990) ("When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [this Court] must act with utmost caution before deciding that it is obligated to entertain the claim."); *id.* at 372-375.

Fannie Mae "shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." Act of Aug. 22, 1974, Pub. L. No. 93-383, Tit. VIII, § 806(b), 88 Stat. 727 (codified at 12 U.S.C. 1717(a)(2)(B)). That provision is most naturally read to refer both to personal and to subject-matter jurisdiction. See 28 U.S.C. 1332(c)(1) (diversity and removal jurisdiction based on corporate citizenship). As Judge Stein noted, however, "Fannie Mae would have no use for diversity jurisdiction if it could enter the federal courts pursuant to its sue-and-be-sued clause." Pet. App. 39a. When it added that language, moreover, Congress did not make a similar change to Ginnie Mae's charter. The most reasonable inference is that Congress did not view such a change as necessary because Ginnie Mae, unlike Fannie Mae, already "had plenary access to the federal courts as an agency of the federal government." *Ibid.*

3. In construing Fannie Mae's sue-and-be-sued clause as a font of original jurisdiction, the court of appeals relied primarily on what it described as a "clear rule" articulated in *Red Cross*: "that 'a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts.'" Pet. App. 5a (quoting 505 U.S. at 255). The court also noted that, until 1954, Fannie Mae's charter had contained language functionally identical to the language held to be jurisdiction-creating in *Red Cross*. *Id.* at 8a (explaining that the pre-1954 statute authorized Fannie Mae to "sue and be sued; complain and defend, in any court of law or equity, State or Federal") (emphasis and citation omitted). The court concluded that, when Congress amended that language to its present

form, "[t]here is no indication that Congress intended to eliminate federal question jurisdiction in 1954 by replacing the phrase 'court of law or equity' with the phrase 'court of competent jurisdiction.'" *Id.* at 9a.

The court of appeals' analysis is unpersuasive. In holding that a sue-and-be-sued clause "*may* be read to confer federal court jurisdiction if * * * it specifically mentions the federal courts," 505 U.S. at 255 (emphasis added), the Court in *Red Cross* did not suggest that an express reference to federal courts in such a clause will *always* carry that meaning. See *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust* v. *Raines*, 534 F.3d 779, 796 (D.C. Cir. 2008) (*Pirelli*) (Brown, J., concurring) (discussing this language in *Red Cross* and explaining that the word "may" is generally permissive rather than mandatory). A hypothetical clause providing that "Fannie Mae may sue and be sued in federal court *only if* another statute independently confers subject-matter jurisdiction," for example, could not plausibly be read as an independent jurisdictional grant, even though it specifically mentions federal courts. See *id.* at 795. Rather, the pertinent language in *Red Cross* simply makes clear that "mentioning federal courts is necessary, but not always sufficient, to confer jurisdiction." *Ibid.*

The holding of *Red Cross* thus is best understood as a "default rule" under which a sue-and-be-sued clause may be read to confer jurisdiction under certain circumstances, rather than a "magic-words test" that applies whenever "the word 'federal'" appears. Pet. App. 25a (Stein, J., dissenting). Rather than treating the mere mention of federal courts as dispositive, the Court in *Red Cross* relied heavily on the fact that the sue-and-be-sued clause at issue there was "in all

relevant respects identical to one on which [the Court had] based a holding of federal jurisdiction" in *D'Oench, Duhme*. 505 U.S. at 257. Fannie Mae's sue-and-be-sued clause is not "in all relevant respects identical" to the clauses at issue in *Red Cross* and *D'Oench, Duhme*, because it authorizes suit only in courts "of competent jurisdiction."

The Court in *Red Cross* also noted that Congress had amended the Red Cross's charter to its present form in 1947, five years after the ruling in *D'Oench, Duhme*. 505 U.S. at 260. The Court viewed that sequence of events as "indicat[ing] that Congress may well have relied on that holding to infer that amendment of the Red Cross Charter's 'sue and be sued' provision to make it identical to the [one construed in *D'Oench, Duhme*] would suffice to confer federal jurisdiction." *Ibid.* No similar inference can be drawn in this case. To the contrary, in 1954, Congress amended Fannie Mae's sue-and-be-sued clause by *eliminating* language identical to that construed in *D'Oench, Duhme* ("any court of law or equity, State or Federal") and replacing it with substantively different language ("any court of competent jurisdiction, State or Federal").

As the court below observed, the legislative history is largely "silen[t]" about Congress's reasons for the 1954 amendment to Fannie Mae's sue-and-be-sued clause. Pet. App. 10a. The court surmised that, "[g]iven the important practical effect of eliminating federal question jurisdiction under Fannie Mae's sue-and-be-sued clause, we should expect the House or Senate to have said something if they intended a change of that sort." *Ibid.* The court failed, however, to grapple with the fact that the 1954 change to the sue-and-be-

sued clause was part of a larger statute that fundamentally transformed Fannie Mae's relationship to the federal government by converting it to a mixed-ownership corporation and providing "for the eventual substitution of private capital for Government investment in its secondary market operations." H.R. Rep. No. 1429, 83d Cong., 2d Sess. 18 (1954); see Pet. App. 34a (Stein, J., dissenting); p. 2, *supra*.

During the period from 1938 until 1954, when Fannie Mae was wholly owned by the federal government, 28 U.S.C. 1349 (and its statutory predecessor) conferred federal jurisdiction over suits by and against the corporation. Assuming that the pre-1954 version of the sue-and-be-sued clause was a grant of federal jurisdiction over suits brought by or against Fannie Mae, the practical effect of that clause was simply to duplicate the conferral of jurisdiction that Section 1349 then provided. After Congress adopted the present sue-and-be-sued language as part of the 1954 amendments, the government's ownership of Fannie Mae temporarily continued to exceed one-half, and Section 1349 therefore continued to provide an independent source of federal jurisdiction for suits by and against the corporation. See Pet. App. 36a (Stein, J., dissenting). Congress expected and intended, however, that majority ownership of Fannie Mae would eventually pass to private hands. See *ibid.*

Under the general rule established by Section 1349, that change in ownership would mean that suits involving Fannie Mae could thenceforth be brought in federal court only if some independent ground of federal jurisdiction existed. The absence of legislative history specifically noting that jurisdictional consequence of Fannie Mae's anticipated privatization pro-

vides no basis for declining to give the phrase "of competent jurisdiction" its natural meaning. And construing the contemporaneous change to the sue-and-be-sued clause in the manner that petitioners and the dissenting judge below have advocated, so that Fannie Mae would continue to be governed by the jurisdictional rule (see 28 U.S.C. 1349) that applies to federally chartered corporations generally, is wholly consistent with the overall thrust of the 1954 amendments. See Pet. App. 37a (Stein, J., dissenting) (explaining that the 1954 Congress intended "to place the government and Fannie Mae on paths that would ultimately diverge," and that "[t]he amendment to Fannie Mae's sue-and-be-sued clause was part and parcel of this overarching intendment").

B. The Question Presented Has Generated Substantial Confusion In The Lower Courts

Respondents are correct that no split among the courts of appeals exists with respect to the jurisdictional nature of Fannie Mae's sue-and-be-sued clause. Like the Ninth Circuit below, the District of Columbia Circuit has ruled that Fannie Mae's charter confers federal jurisdiction. See *Pirelli*, 534 F.3d at 784-788. Judge Brown sharply disagreed with that conclusion, see *id.* at 795-800, although her opinion was styled a concurrence because the majority affirmed the district court's dismissal of the complaint on the merits.

The courts of appeals have divided, however, on the proper interpretation of functionally identical language in the sue-and-be-sued clauses of other federally chartered entities. In *Western Securities Co.* v. *Derwinski*, 937 F.2d 1276 (1991), the Seventh Circuit held that a provision authorizing the Administrator of the Department of Veterans Affairs (DVA) to "sue or

be sued in any court, state or federal, of competent jurisdiction * * * emphatically does not mean that [suit] could have been filed in federal district court," because the clause "is not a grant of jurisdiction." *Id.* at 1279. Other courts of appeals have reached the same conclusion in construing similar provisions. See *C.H. Sanders Co.* v. *BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir. 1990) (holding that provision authorizing Secretary of HUD to "sue and be sued in any court of competent jurisdiction, State or Federal," 12 U.S.C. 1702, was "only a waiver of sovereign immunity and not an independent grant of jurisdiction"); *Lomas & Nettleton Co.* v. *Pierce*, 636 F.2d 971, 972-973 (5th Cir. 1981) (similar); *Lindy* v. *Lynn*, 501 F.2d 1367, 1368 (3d Cir. 1974) (similar); see also *Bor-Son Bldg. Corp.* v. *Heller*, 572 F.2d 174, 181 (8th Cir. 1978) (dicta). By contrast, the First Circuit recently held that a sue-and-be-sued clause applicable to the Federal Home Loan Bank of Boston, which authorizes the bank "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal," 12 U.S.C. 1432(a), constitutes an independent grant of federal jurisdiction. See *Federal Home Loan Bank* v. *Moody's Corp.*, No. 14-2148 (May 2, 2016), slip op. 9-16. The First Circuit agreed with the Ninth Circuit's holding in this case that Congress's inclusion of the phrase "of competent jurisdiction" did not justify construing the bank's sue-and-be-sued clause differently from the Red Cross's. See *id.* at 15.

As respondents note (Br. 26), the court of appeals decisions that have declined to find jurisdiction under sue-and-be-sued clauses like Fannie Mae's, which both mention the federal courts and contain the phrase "of competent jurisdiction," were issued before this

Court's decision in *Red Cross*. For the reasons stated above, however, *Red Cross* does not control the outcome here. See pp. 13-15, *supra*. In any event, although the absence of a circuit conflict ordinarily weighs strongly against a grant of certiorari, the nature of the question presented here would justify a departure from that general practice. When suit is brought against Fannie Mae in state court and removed to federal court, a district court's decision to remand for lack of jurisdiction typically "is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d). As a result, many district court decisions declining to find jurisdiction in these circumstances have evaded appellate review, including in a number of cases decided since *Red Cross*. See Pet. 19-20 (citing cases). Indeed, Fannie Mae itself has successfully obtained remands to state courts in several cases by asserting a view of its sue-and-be-sued clause that is inconsistent with its position in this Court. See Pet. Reply Br. 8-9.

Given the division of authority described above; the significant inconsistency in the treatment of this issue both by courts and by litigants; the large number of suits in which Fannie Mae is a party, see Pet. Reply Br. 10; and the importance of the issue to Fannie Mae and other federally chartered entities,[3] this Court's review is warranted.

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[3] As noted, see pp. 1-3, 17-18, *supra*, similar sue-and-be-sued clauses apply to HUD, DVA, and Ginnie Mae. See 12 U.S.C. 1702 (suits against FHA under National Housing Act); 12 U.S.C. 1723a(a) (Ginnie Mae); 38 U.S.C. 3720(a)(1) (suits against DVA for certain veterans' benefits). Although all three of those entities are authorized by statute to bring suit in federal court, see 28 U.S.C. 1345, and to remove suits filed in state court, see 28 U.S.C. 1442(a), resolution of the question presented would determine whether

C. The Complex Procedural History Of This Case Should Not Dissuade The Court From Granting The Petition

When the Ninth Circuit asked for supplemental briefing as to whether the district court had subject-matter jurisdiction, Fannie Mae likely could have raised a defense of res judicata to prevent relitigation of that issue. That fact should not dissuade the Court from granting the petition, however, because any such argument has been forfeited.

1. Res judicata generally prevents a court from revisiting an issue that the parties have had a full and fair opportunity to litigate to final judgment. See 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4402 (2d ed. 2002) (Wright & Miller). In this case, the issue of subject-matter jurisdiction was litigated from the outset. Fannie Mae cited its sue-and-be-sued clause as a basis for removing the case to federal court, see Pet. App. 47a; petitioners sought a remand, arguing that the district court lacked jurisdiction, see D. Ct. Doc. 11, at 2 (Aug. 26, 2002) ("Fannie Mae's federal charter does not confer automatic federal question jurisdiction.") (capitalization altered); and the district court denied the remand request without explanation, see Pet. App. 43a-44a. When the court later dismissed petitioners' claims against Fannie Mae, the court stated that its jurisdiction over the case was "based upon" Fannie Mae's sue-and-be-sued clause. See D. Ct. Doc. 59, at 2. Petitioners then appealed to the Ninth Circuit, where they argued that removal was improper due to the lack of diversity or a federal question. See 03-56580 Resp. to Order to

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private litigants may commence suit against them in federal court based on state-law causes of action.

Show Cause, 4-5 (Nov. 10, 2003). The Ninth Circuit summarily affirmed the district court's judgment without mentioning the jurisdictional issue, see 03-56580 Mem., and petitioners unsuccessfully sought this Court's review, see 543 U.S. 918.

At that point, the district court's judgment "became res judicata to the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 152 (2009) (citation and internal quotation marks omitted). The res judicata bar precludes a litigant from filing a new suit in order to raise an issue that was litigated or could have been litigated in a prior suit, see Wright & Miller § 4402, or from seeking under Rule 60(b) to reopen a prior judgment that has become final, see *id.* § 4428. Res judicata generally prevents relitigation even of challenges to the first court's subject-matter jurisdiction. See *Travelers*, 557 U.S. at 152-153. Because petitioners had a full and fair opportunity to contest the district court's jurisdiction over their claims against Fannie Mae, that issue became res judicata when this Court denied certiorari in 2004.

2. This Court need not address or resolve the res judicata issue in order to reach the question presented here, however, because res judicata is a defense that generally may be forfeited. See Wright & Miller § 4405 ("The fundamental premise of the requirement that preclusion be pleaded and proved is that a party entitled to demand preclusion is also entitled to waive it. Express waiver is accepted, and a preclusion argument may be abandoned after it is initially raised.")

(footnotes omitted). In April 2012, when the Ninth Circuit called for briefing on the issue of the district court's subject-matter jurisdiction, Fannie Mae could have argued that the issue had become res judicata, but it apparently did not do so. Fannie Mae also has not raised a res judicata defense in opposing certiorari. The question whether Fannie Mae's sue-and-be-sued clause provides an independent ground of federal jurisdiction therefore is properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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